No. 592.

FILED
APR 10 1901
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

Affidavit & Notice of Motion

METCALF BROTHERS & CO.,
Petitioners,

against

BENJAMIN BARKER,
Trustee.

Filed April 10, 1901.

592

OCTOBER TERM 1900.

AFFIDAVIT AND NOTICE OF MOTION TO ADVANCE THE ARGUMENT ON THE QUESTIONS OF LAW CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

NELSON S. SPENCER.
of Counsel for Petitioners.

LIVINGSTON MIDDLEDITCH CO., 85 DUANE ST., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

METCALF BROTHERS & CO.,
Petitioners

AGAINST

BENJAMIN BARKER,
Trustee

SIRS:

Please take notice that upon the petition of Metcalf Brothers & Company, hereto annexed, and upon the questions of law certified to the Supreme Court of the United States by the Circuit Court of Appeals for the Second Circuit asking for instruction for its decision upon the petition of Metcalf Brothers & Co. to that court to superintend and revise in matter of law an order of the District Court of the United States for the Southern District of New York made in the matter of Lesser Brothers, bankrupts, we will apply to the Supreme Court of the United States, at a session thereof to be held at the Capitol, in the City of Washington, District of Columbia, on Monday, the 15th day of April, 1901, at the opening of Court on said day, or as soon thereafter as counsel can be heard, for an order advancing the argument to be had upon said certified questions and directing that the argument upon such questions be taken up out of its order upon the docket

and be set down for a particular day, and for such other and further relief as to the Court may seem proper.

Dated, New York, April 3d, 1901.

Yours, &c.,

STICKNEY, SPENCER & ORDWAY,
Solicitors for Metcalf Bros. & Co., Petitioners,
Office and Post Office Address,
No. 31 Nassau Street,
New York City.

To

Messrs. Anderson & Anderson,
Solicitors for Benjamin Barker, Esq., Trustee.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1900.

Metcalf Brothers & Co.,
Petitioners
against
Benjamin Barker,
Trustee

To the Judges of the Supreme Court of the United States:

Your petitioners, Manton B. Metcalf, Stephen O. Metcalf, Jesse H. Metcalf and Edwin R. Dillingham, composing the firm of Metcalf Brothers & Company, respectfully show:

First.—Your petitioners were, and still are, co-partners engaged in business in the City of New York.

under the firm name of Metcalf Brothers & Company. On or about the 2d day of October, 1896, Tobias Lesser, Israel Lesser and Simon Lesser, being copartners engaged in business in the City of New York under the firm name of Lesser Brothers, made a number of transfers, conveyances, assignments and other acts, whereby they sought to dispose of all of their property in fraud of their creditors. Among other things, they procured the fraudulent appointment of one Morris Moses as Receiver of their copartnership property.

Your petitioners on the 22d and 29th days of October, 1896, respectively, recovered certain money judgments against the said Lesser Brothers in the courts of the State of New York, and thereafter, and on the 18th day of December, 1896, commenced an action in the Supreme Court of the State of New York to set aside the judgments, transfers, conveyances, assignments and other acts done by the Lessers in fraud of their creditors, including the said fraudulent receivership. This action came to trial in the said Supreme Court of the State of New York, and on the 11th day of April, 1898, a final judgment was entered in that action adjudging that all the acts, instruments and proceedings done by Lesser Brothers were fraudulent and void as against your petitioners.

Subsequently appeals were taken from said judgment to the Appellate Division of said Supreme Court, and thereafter to the Court of Appeals of the State of New York. Appeals were so taken both by the plaintiffs and by the defendants. On the 6th day of February, 1900, the said Court of Appeals affirmed the judgment of the Special Term of the Supreme Court adjudging the acts, instruments and proceedings of Lesser Brothers fraudulent and void, and awarded to your petitioners the entire relief for which they had asked in the complaint in their equity action.

In the meantime, and in November, 1896, certain other creditors of Lesser Brothers had applied to have

removed the Receiver which Lesser Brothers had procured to be fraudulently appointed, and the Court, upon that application, though not removing him, had associated with him another Receiver of its own selection. These two Receivers had become possessed of certain of the property of Lesser Brothers, and out of the proceeds of the sale of that property in their hands, they were directed by the judgment in your petitioners' equity action, to satisfy the amount of the money judgments procured by your petitioners upon which the equity action was based.

Second.—Pending the appeal to the Court of Appeals of the State of New York in your petitioners' equity action, the said Lessers on May 12th, 1899, were adjudged bankrupts, on their own petition, in the United States District Court for the Southern District of New York. On June 7, 1899, Benjamin Barker was elected Trustee of said bankrupts. After the decision of said Court of Appeals, and on the 29th of March, 1900, the said District Court, upon the application of the said Trustee, made an order enjoining your petitioners from collecting under or by virtue of the said judgment in their equity action any money or property from the Receivers of said Lesser Brothers, or otherwise.

Your petitioners being aggrieved by said order, presented a petition to the Circuit Court of Appeals of the United States for the Second Circuit, to superintend and revise in matter of law the said order of the District Court of the United States. Upon the argument had upon said petition before said Circuit Court of Appeals for the Second Circuit, the said Court certified to this Court certain questions of law concerning which it desires the instruction of this Court for its proper decision. The said certificate was filed in the office of the Clerk of this Court and the case docketed on or or about the 11th day of March, 1901.

Third.—Your petitioners now pray for an order of

this Court advancing the argument to be had upon said certificate, and directing that the argument upon said certificate be taken up out of its order on the docket, and be set down for a particular day. The reasons for the prayer of your petitioners and the special and peculiar circumstances which exist therefor are as follows:

1. This matter will not be regularly reached for argument, as your petitioners are informed, until the spring of 1902. The proceedings instituted by your petitioners to collect their money judgments of October, 1896, have already been pending nearly five years, of which one has already been consumed in the United States courts in proceedings instituted after they had procured an absolute direction for immediate payment out of funds in the possession of the courts of the State of New York. The expense to your petitioners in the United States courts has already been great and, if successful, they have no hope of reimbursement, as there are, as they are informed, no assets in the hands of the trustee. For the delay entailed by the submission to this court of the questions involved they will receive no compensation.

2. But a still more important fact is that the courts of the State of New York and of the United States for the Southern District of New York are dependent upon the decision of this court for the proper administration of the assets of said bankrupts. A large amount of litigation and the collection, administration and proper distribution of the property of Lesser Brothers is substantially at a standstill and cannot proceed until this court has passed upon the questions of law submitted to it. The delay involved in allowing the argument on these questions to await its order on the calendar affects a large number of persons and is extremely detrimental to their interests. To make this plain, it is necessary to refer briefly to the situation of the bankrupts' estate at the present time.

Lesser Brothers, the bankrupts, were possessed at the time of making the transfers in question only of certain goods and merchandise used in the conduct of their business, and of certain outstanding accounts. They tried to place the goods and merchandise in the hands of certain favored persons who were, as they said, their creditors, by means of confessions of judgment made by them in favor of these alleged creditors. These confessions of judgment and the executions issued thereon were set aside by the judgment in your petitioners' equity action. But while that action was pending the Receivers to which reference has been made, by virtue of an order of the Supreme Court of New York, had been directed to take the merchandise into their possession, to sell it and to hold the proceeds until the further order of the Court determining the various claims upon it. The Receivers did sell said merchandise, and have since held and are now holding the proceeds, and will be compelled to hold the same until the decision of this Court, as the Supreme Court of the State of New York cannot properly direct the distribution of the money in the hands of its Receivers until it be determined what is the status of the Trustee in Bankruptcy in relation thereto. The entire fund in the hands of the Receivers, as your petitioners are informed and believe, is claimed by the Trustee in Bankruptcy.

The outstanding accounts were assigned by the bankrupts to certain other favored alleged creditors. The transfers of these accounts were also adjudged fraudulent by the Supreme Court of New York in your petitioners' equity action. These accounts have presumably been collected by these transferees and they now hold the proceeds. Neither the Receivers in the State Court, nor the Trustee, nor any other judgment creditors of Lesser Brothers, are in a position to collect these accounts from the transferees until it can be determined what are the rights of these creditors as between themselves.

There are now pending in the Supreme Court of the

State of New York seven actions brought by various judgment-creditors to set aside in their favor the transfers of Lesser Brothers as fraudulent and void. There is also pending in said Supreme Court an action brought by the Receivers appointed by the State Court also to set aside these transfers and assignments in favor of the Receivers. There is also pending an action brought by the Trustee in Bankruptcy to accomplish the same result. There is also pending the action in which the Receivers were appointed brought to determine the various claims to the merchandise of which the Receivers hold the proceeds of sale. None of these actions can be finally determined until the decision of this Court, determining the rights of the various judgment-creditors in their relation to the trustee of the bankrupts' estate. The prosecution of many of them is, in fact, at the present time enjoined by the trustee pending said decision, and those of them which are not, are liable to be so enjoined at any time.

There are also pending, as your petitioners are informed, petitions in the Circuit Court of Appeals for the Second Circuit to review various orders made by said District Court enjoining proceedings in the State Courts which cannot be properly passed upon by said Circuit Court of Appeals until this Court has answered the questions certified to it. In other words the delay in this Court prevents the final settlement and disposition of the property of the bankrupts now in the hands of said Receivers or to be recovered in actions against the transferees of the accounts.

It will be an immense saving to all parties concerned if this Court can speedily hear and determine the questions involved. In the meantime the assets of the bankrupt estate in the hands of the transferees of the Lessers are likely to be dissipated, and it will become more and more difficult to collect from these transferees the amounts for which they are liable.

3. Moreover, the questions certified are such as are of public importance and essential to a uniform construction and administration of the bankrupt act through-

out the United States. It is of importance, your petitioners respectfully submit, that a decision on them should be rendered as soon as possible. Your petitioners are informed that the question as to the jurisdiction of the District Court is one which has been raised in other courts of the United States and in the State courts and has been decided adversely to the decision of the District Court here to be reviewed (Frazier *v.* Southern Loan & Trust Co., 99 Fed. Rep., 707. *In re* Ward, 5 Amer. Bank. Rep., 215). In the latter case Judge Lowell says: "It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court." The question concerning the validity and precedence of the lien obtained by the commencement of a judgment creditors' action has also been elsewhere decided adversely to the decision of the District Court here to be reviewed (Doyle *v.* Heath, 47 Atl. Rep., 213; Taylor *v.* Taylor, 45 Atl. Rep., 440). Your petitioners are advised by their counsel that it will be of great service to the proper administration of the bankruptcy law, especially in avoiding a conflict between the courts of the United States and of the various States, if this Court may deem it proper to consider and decide the questions certified with as little delay as possible.

Wherefore your petitioners humbly pray that this Court may advance the argument to be had upon the said certificate of the Circuit Court of Appeals, and set the same down for a particular day in the immediate future.

And your petitioners will ever pray, &c.

METCALF BROS. & CO.,
By STICKNEY, SPENCER & ORDWAY,
Solicitors,
31 Nassau Street,
New York City.

NELSON S. SPENCER,
Of Counsel.